

PARSONS, C. J. As the plaintiff does not occupy a fiduciary position entitling him for his protection to the prospective decision of questions that may arise under the will, and as the defendant, whom the plaintiff claims does occupy such a position, does not desire, but objects to, their present determination by way of advice to him, there is no ground upon which the court may lawfully advise the parties. *Glover v. Baker*, 76 N. H. 393; *Day v. Washburn*, 76 N. H. 203; *Harvey v. Harvey*, 73 N. H. 106; *Drake v. True*, 72 N. H. 322; *Bailey v. McIntire*, 71 N. H. 329; *Ellis v. Aldrich*, 70 N. H. 219, 222; *Gafney v. Kenison*, 64 N. H. 354; *Greeley v. Nashua*, 62 N. H. 166, 167; *Opinion of the Justices*, 62 N. H. 706; P. S., c. 207, s. 8.

*Exception overruled.*

PEASLEE, J., did not sit: the others concurred.

Cheshire, }  
April 7, 1914. }

ANSEL J. WHITTEMORE v. BOSTON & MAINE RAILROAD.

CASE, for wrongfully ejecting the plaintiff from a train. This is the same case reported 76 N. H. 388, and *ante*, 61. Upon this trial, at the October term, 1913, of the superior court, there was a verdict for the plaintiff. At the beginning of the trial and again after the verdict, the defendants made a motion for judgment, which was denied by *Plummer, J.*, subject to exception. The ground of the motion was that upon the facts reported upon the first trial and claimed to exist at the present trial, a judgment for the plaintiff would be in violation of the federal interstate commerce law.

*Joseph Madden*, for the plaintiff.

*John E. Allen*, for the defendants.

WALKER, J. In *Whittemore v. Railroad, ante*, 61, 62, the court said in reference to the former decision, that if it "involved the determination of a federal question, the defendants no doubt can preserve their rights and have the question reviewed in the federal court; but questions once decided in this court are not reëxamined

in the same case upon a subsequent transfer. *Kidd v. Trust Co.*, 75 N. H. 154, 158." No additional reasons are now presented for a reconsideration of the federal question suggested, or for a modification of the opinion given on the first transfer, as reported in 76 N. H. 388. Nor is there occasion for the court in the exercise of its discretion (*Hedding v. Gallagher*, 72 N. H. 377, 379) to again consider the federal question which is again raised by the defendant upon the same state of facts.

*Exception overruled.*

PLUMMER, J., did not sit: the others concurred.

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Rockingham, }  
May 5, 1914. }

NELLIE F. BROWN v. HENRY E. RANDALL & a.

ASSUMPSIT, against Henry E. Randall, Eugene F. Hobson, and four others, to recover damages for breach of contract. Trial by jury and verdict for the plaintiff. Transferred from the April term 1912, of the superior court by *Pike, J.*, on the exception of each defendant to the denial of his motion for the direction of a verdict in his favor.

*Eastman, Scammon & Gardner*, for the plaintiff.

*Joseph P. Carney* and *Herbert N. Blake* (both of Vermont) and *Ernest L. Guptill*, for the defendants.

*Per Curiam.* There is no evidence that Eugene F. Hobson ever promised the plaintiff anything. It can be found that the other defendants promised her that if she would put her machinery into the proposed business her husband should manage it, that after she had performed her part of the agreement they assumed the management, and that in consequence of this she lost her machinery; in other words, it can be found that she lost her machinery in consequence of the defendants' breach of contract. As to Eugene F. Hobson, the exception is sustained and the verdict is set aside. As to the other defendants the order is,

*Exception overruled.*